UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

HOSPITAL MENONITA DE GUAYAMA, INC. **and** **UNIDAD LABORAL DE ENFERMERAS(OS)Y EMPLEADOS DE LA SALUD**	Cases No: 12-CA-214830, 12-CA-214908, 12-CA-215040, 12-CA-215039, 12-CA-215665, 12-CA-217862, 12-CA-218260, 12-CA-221108

RESPONDENT'S REPLY BRIEF TO COUNSEL FOR THE GENERAL COUNSEL'S ANSWERING BRIEF TO RESPONDENT'S EXCEPTIONS

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Most of the issues concerning the cases of reference are derivative of one mayor issue: whether the NRLB's successor bar doctrine, articulated in *UGL-UNICCO*, 357 N.L.R.B. 801 (2011), remains good law. In its brief, Respondent argued that UNICCO no longer represented the appropriate fulcrum between the NLRA's statutory goals of promoting labor relations stability on one side, and respecting the employees' wishes concerning representation on the other. The GC waits 40 pages into its Answering Brief before conceding the argument, but then fails to draw out the simplifying consequences of this acquiescence. [1]

The GC's concession has two derivative consequences that impact the findings of this case. First, in the absence of an absolute bar, the Respondent showed that it had refuted the presumption of majority employee support for the Union. Here, the Respondents submitted clear evidence showing that the majority of employees in each of the five bargaining units no longer supported the Union. While the ALJ, given the bar, did not allow said evidence to be introduced at the hearing, the Respondent did take the precaution of making the necessary and sufficient offer of proof to demonstrate its case. See TR 119-218. In the absence of demonstrable majority support, the Respondent did not engage in a violation of the duty to bargain. Second, prior to the loss of majority support and the withdrawal of recognition, the alleged ULP's are either contradicted by the evidence, or isolated and insufficient instances that in themselves are unable to disavow the bonafide withdrawal of recognition after a majority of employees expressed their Section 7 rights to not be represented.

[1] The GC's language endorsing the Respondent's petition is as follows: [the GC] "is of the view that the Board should overrule *UGL-UNICCO*, and return to the rule of *MV Transportation* substantially for the reasons expressed in the majority opinion in *MV Transportation*, 337 NLRB 770 (2002) Member Hayes's dissenting opinion in *UGL-UNICCO*, and Member Miscimarra's dissenting opinion in *FJC Security Services*, 360 NLRB 929 (2014)." *GC, 40.*

The GC does not contest that at all relevant times the Union lacked majority support. Its argument is subsidiary. It contends that despite overwhelming evidence of lack of Union support, "the withdrawals of recognition were unlawful because they occurred at times when significant unremedied unfair labor practices existed." See *ALJD, 11, l. 14-15* (summarizing GC position).

The evidentiary record shows that the GC overreaches in its arguments, which can be reduced to an ABC. The Respondent committed unfair labor practices in: (a) unilaterally implementing a provisional change (from September 20 to October 21, 2017) in the working hour shift of some of the RNs; (b) unilaterally granting a one-time $150 gift to a reduced number of unit and non-unit employees that stayed overnight at the Hospital that fateful night that Hurricane María passed over and through Puerto Rico; and (c) by allegedly refusing to recognize and bargain with the Union from September 13, when Respondent took over the Hospital, to November 6, 2017. We proceed to examine *seriatim* these claims.

A. The Provisional Change in the RN Work Shift is not an ULP

The first claim is based on the contention that the Respondent engaged in an ULP when on the day Hurricane María hit the island, the Hospital implemented a change in the hourly shift of the RNs by extending the working shift from 8 to 12 hours. This change, limited to some of the Registered Nurses, was provisional (September 20-October 21) as it was implemented following the worst part of Hurricane's Maria impact on Puerto Rico. To start, all the parties below, including the GC and the Union, stipulated to the principal reason for this change: a governmental emergency mandate ordering a curfew that started on that September 20, when Hurricane Maria devastated the island. The Stipulation reads as follows: "After Hurricane María, Respondent temporarily assigned employees in the RN unit to work 12 hours schedules, instead

of 8 hours shift, which was their regular schedule in reaction to a curfew established by the local government, among other reasons." **JX 1, ¶41.**

At no time did the Union charged the Respondent of committing an ULP by this shift modification to adapt the provision of medical services to the curfew ordered by the government. Neither does the original complaint filed by the GC allege that the shift modification was an ULP. While the GC attempted to introduce this allegation during the December hearing, the ALJ refused the request to amend the complaint, finding that any additional charge concerning this matter was Section 10(b) time barred. The ALJ however allowed that fact to be used for purposes of "shedding light on the true character of the matters occurring within the limitations period." Yet, at no moment did it rely on said testimony as relevant to the unfair labor practices found by him to have occurred in his decision of the case. **ALJ 12, l. 35.** We contend that that inference is unsupported by the evidence.

There is no reason to defer to the GC argument. First, the ALJ did not use this matter to infer any support for the unfair labor practices found in his decision. **ALJ 12, l. 35.** Notwithstanding Respondent in its Exceptions to ALJD (III-G) argued against said determination. Second, aside from the stipulated fact, the only evidence pertaining to temporary change of work schedules for the RN came from Mrs. W. Rodríguez, the Human Resources Director. During her testimony, which was never contradicted by the GC, she explained that the temporary change was implemented in response to the Government's established curfew; to ensure the employees did not have to drive back home during the dark hours (there was no power anywhere in the Island); and as part of the emergency procedures that had been in place way before Respondent took over the operations of the Hospital. Indeed, the HRD testified that

changing the work schedules of the employees belonging to the RN unit during national emergencies was part of the Hospital's emergency procedures in place for as long as she could remember. This testimony was not contradicted in any way and the GC did not present any witness that testified to the contrary. Consequently, absent any evidence that the change in work schedules for the RN unit had any other purpose or motive, the inference reached by the ALJ is unfounded, as well as the GC's attempts to characterize that change as an unfair labor practice. In sum, there is no support at all for the GC's argument that the modification of some of the RN's work shift constituted a significant and unremedied ULP that taints the withdrawal of recognition.

B. The Granting Of A Monetary Distinction For Voluntarily Staying At The Hospital On The Night Of The Hurricane Is Not An ULP

On the night of September 20, 2017, the most furious hurricane of the century hit Puerto Rico, wrecking the entire island and resulting in the illness, injury and death of thousands of Puerto Ricans. The entire power grid of the island was destroyed, leaving Puerto Rico without much of its communication and transportation system. This situation lasted for several months, according to the Complaint, at least until January 2018. On that fateful night, the Hospital became a sanctuary and several hundred employees, unit and non-unit, decided on their own to stay overnight and serve those who came in need of medical attention. They were paid their wages and overtime for so doing. But in addition, on Thanksgiving Day, they were formally distinguished for service beyond the call of duty, for going out of their way and serving others instead of going home to serve their own.

The GC argues that the one-time award of $150 and the certificate of recognition that the Respondents granted them on that occasion was a statutory act of remuneration subject to all the

strictures of a quotidian compensation, particularly prior bargaining with the Union. The Board law, fortunately, does not cashier human kindness in such manner, reducing extraordinary compassion to such ordinary calculations. What makes the monetary award granted to the relevant unit and non-unit employees is that the employees acted out of benevolence: tragedy struck, they sacrificed for the sake of their fellow humans without expectation of remuneration. Board law backs this principle: that a gift, or a moral distinction, accompanied or not by a one-time metallic award, is not the sort of human recognition that requires prior bargaining with the Union.

The award given here is the type of award a person receives once in a lifetime, and none of the exemplary employees could foresee or expected. It was not a quid pro quo for work performed. A review of the certificate handed to these individuals does not indicate that it was for work performed, but for "serving with Christian Love" and for "putting the life and safety of our patients above all during the emergency caused by María." The award and the certificate were "based on unpredictable, discretionary factors" and those employees who stayed that night to serve others "had no reasonable expectation concerning the payments." *Phelps Dodge Mining Co. v NLRB*, 22 F.3d 1493 (10th Cir. 1994). The distinction given to them, is more moral than monetary, more exceptional than routine: is not "wages" or "terms and conditions" of employment under Section 8(d). 29 U.S.C. § 159(d).

In sum, as with the prior alleged ULP, there is no support here for the GC's draconic reading that the Respondent committed a significant and unremedied ULP when it granted some unit employees a one-time distinction for their sacrifice on the night of September 20, 2019.

C. The Evidence Does Not Support the conclusion that Respondent Delayed Recognizing the Union from September 13 to November 6, 2017 and thus Engaged in an ULP

Finally, the Respondent claims that the GC overreached when it claims that since it acquired the Hospital it refused to recognize the Union as the labor representative of the majority of the employees. While there was a delay in said recognition, it was well borne by the factual situation on the ground.

On September 5, 2015, a few days prior to the September 12, 2017 acquisition of the Hospital, the island was first hit by Hurricane Irma. While not as ferocious as Hurricane María, Irma nonetheless had some bite in it. The hurricane caused significant damages to the island, inflicting sustained tropical storm force winds, that cut electrical power to approximately 1.1 million out of 1.5 million Puerto Ricans customers. Throughout Puerto Rico, 781 out of 1,600 telecommunications towers went out of commission, primarily due to power outages, leaving large sectors of the island without communications.[2] It is with that backdrop that on September 8, 2017, before the acquisition of San Lucas' Hospital, the Respondent first wrote to the Union. **JX 11.** While it is true that said letters does not immediately recognize the Union, it does address the Union in its capacity as the representatives of the employees and informs it of its intent to modify the terms of the collective bargaining agreements, as allowed by prevalent case law. There is no failure to recognize there.

The September 18, 2017 letter does not support either the inference that Respondents intentions were to delay or and peremptory refusal to recognize the Union. In that letter, written in response to the Union's September 13, 2017 letter, in which it demands recognition, all the

[2] See https://en.wikipedia.org/wiki/Hurricane_Irma#Puerto_Rico.

Hospital said was that once it finalized the process of determining whether a majority of unionized employees accepted the offer, it would act in accordance with what it stated in its September 8 letter, to wit, recognizing the Union as the collective bargaining representative. That is not a denial of recognition. Also, only two business days had passed since Respondent took over the operations of the Hospital and received the Union's September 13th letter. That is not enough time for the department of Human Resources to verify all of the letters of acceptance. As the Human Resources Director testified –the only witness presented by the GC—the process was complicated by the preparations for Hurricane María, which was set to hit the Island on September 19-20. So, it is not accurate to infer that Respondent's intent was to delay recognizing or bargaining with the Union because two business days after it acquired the operations of the Hospital it had not completed its review of all of the acceptance letters. Much less when it is considered that by September 18 all resources of the Respondent were allocated to preparing for the arrival of María.

In sum, these letters by themselves do not justify the inference overdrawn by the GC, that the Respondents engaged in a deliberate delay in recognizing the Union.

The GC's suggestion that the Respondents further delayed when the letter of September 18 was sent by certified mail on October 4, 2017 and by hand on October 13, 2017 is also an overreach of reality. The GC's story line that ignores the reality of Hurricane María. A little candor would be more becoming Hurricane María hit the Island on September 20, 2017, causing the most catastrophic damage to the island residents and structure in over a century. There are numerous Reports regarding the paralysis and crisis affecting Puerto Rico from that night on and for several months thereafter, when the island was sunk into overall despair, particularly lack of

communication. Although understated, it should suffice for present purposes to simply cite the GC's complaint below: "*From on or about September 19, 2017 until at least on or about January 21, 2018 electric power, the water supply and the means of communications and transportation in Puerto Rico were severely damaged as a result of Hurricane María.*" ¶7(d) of the Consolidated Complaint.

The unreasonableness of the inference is also made clearer when considering the only testimony presented regarding those facts, that of HR Director Waleska Rodriguez. She testified and the GC provided no evidence to contradict her, that while the Hurricane caused some delay in the process of dealing with the Union, she still accepted that the Union was d facto "the representatives of the employees that they represented." **TR. 236.** This testimony is consistent with the communication of October 12, 2017 by Ariel Echevarria the Union representative, to Ms. Rodriguez stating: Hi! *Given the Union recognition by the Hosp. Menonita Guayama*, I need dates for us to sit down and talk accordingly. Thanks !!!" JE: 14. The GC fails to acknowledge that Respondent and the Union agreed to meet on Monday, October 16, at 3:00 p.m. **JX:14, p. 7.** The Union representative did not attend and excused himself on October 18, 2017. **JE: p. 9.** On that same date, they agreed to meet on October 20, 107. **JE: 10.** On said date, Mr. Echevarria again did not show up, although another Union rep, Ms. Ingrid Vega, did. JE:11. An examination of the record shows that from October 12 onwards, the Union and Respondent communicated routinely about work related issues. See e.g., JE:14, pp. 13-27.

This situation is culminated by the written letter of November 6, 2017 recognizing the Union. JE:17(a)

In sum, setting aside the GC's speculative inference, the uncontroverted evidence shows that the Respondent acted reasonably in assuming control of the Hospital, in awaiting to verify the response to the employment offers in the mist of the disaster caused by Maria, in notifying the Union of its intent to recognized them, in treating the Union de facto as the representative of the employees, and in recognizing the Union in writing on November 6, 2017. While the GC claims that the delay was an intentionally flouting of the law, the evidence on the record well revels the context surrounding the same, and the glaring disregard for the catastrophic circumstances facing the island and the Hospital during this critical period of the history. As the ALJ recognizes, furthermore, this alleged delay was not even "alleged in the complaint" **ALJD: 12, l. 40**. Nor was an amendment to the complaint ever requested.

Respondent notes furthermore, that throughout this period, from September 13, 2017 through February 7, 2018, the Union at no time made a request to bargain with Respondents. The complaint does not allege any failure to bargain during this period either. The Union first makes a bargaining demand on February 7, 2018, following the first of Respondent withdrawal of recognition. If the successor bar were not in place, as we argued, the Respondent's offer of proof would have defeated the rebuttable presumption of Union majority support in all of the Bargaining units.

Also, GC's statement that Respondent did not present an exception concerning the refusal the bargain findings in the ALJD is unfounded since if this Honorable Board finds that the Hospital acted correctly when it withdraw recognition from the Union obviously there did not exist any obligation on the part of Respondent to bargain with the Union.

WHEREFORE, in light of the foregoing discussion it is respectfully requested that the Administrative Law Judge decision be overturned and the findings against Respondent of the commissions of unfair labor practices be dismissed in their entirety.

Respectfully submitted on October 7th, 2019.

CERTIFICATE OF SERVICE

I hereby certify that a copy of this Respondent's Reply Brief To Counsel For The General Counsel's Answering Brief To Respondent's Exceptions has been sent on this same date by email to Unidad Laboral de Enfermeras(os) y Empleados de la Salud at presidente@unidadlaboral.com and its legal representative, Harold E. Hopkins, Jr., to his email snikpohh@yahoo.com and to Counsel for General Counsel, Celeste Hilerio Echevarría at her email address celeste.hilerio-echevarria@nlrb.gov.

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